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6 UNITED STATES BANKRUPTCY COURT
7 EASTERN DISTRICT OF WASHINGTON

8 In Re:)
9 DUNCAN J. McNEIL,)
10 Debtor(s).)

No. 01-06073-W11
Adv. No. A02-00010-W11

11 JAY S. JUMP,)
12 Plaintiff(s),)

MEMORANDUM DECISION
RE: PLAINTIFF'S RULE 12
MOTION

13
14 vs.)

15 DUNCAN J. McNEIL,)
16 Defendant(s).)

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18 DUNCAN J. McNEIL,)
19 "Counter Claimant.")

20 BROADWAY BUILDINGS II L.P., et al.,)

21 "Involuntary)
22 Counter Claimants,")

23 vs.)

24 MARK T. YOUNG, et al.)

25 "Counter Defendants.")

FILED

MAY 20 2002
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T. S. MCGREGOR, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

26 THIS MATTER came on for hearing before the Honorable
27 Patricia C. Williams on April 29, 2002 on Plaintiff Jay Jump's
28 Rule 12 Motion (Docket No. 10). The following parties appeared:

MEMORANDUM DECISION RE: . . . - 1

ENTERED
MAY 20 2002

<u>Attorney</u>	<u>Representing</u>
Jay Jump	Self
Mark Young	Interested Party

The debtor-defendant was not present.

This dischargeability action was filed during the pendency of the since dismissed underlying bankruptcy proceeding. The debtor answered the Complaint, asserting various affirmative defenses, "counterclaims" and listing various parties as "involuntary counterclaimants¹." The plaintiff has brought this motion seeking dismissal of the so called "counterclaims"² and an order striking the pleadings filed by the debtor on various bases. The motion was served on the debtor and other interested parties. The only response received from the debtor was an "Amended Answer" filed the Thursday prior to the Monday hearing, which is virtually identical to the Amended Answer filed in adversary proceeding A02-011-W11. The court reviewed the motion, files and records herein, including the "Amended Answer", has been fully advised in the premises and now enters its Memorandum Decision.

As in related proceeding A02-011-W11, the debtor has amended his counterclaims, as a matter of right, as no responsive pleading

¹As explained in the court's Memorandum Decision entered in adversary proceeding A02-011-W11, this attempted involuntary joinder is ineffective. See Followway Productions, Inc. v. Maurer, 603 F.2d 72 (9th Cir. 1979); Caprio v. Wilson, 513 F.2d 837 (9th Cir. 1975); Independent Wireless Telegraph Co. v. Radio Corp. of America, 269 U.S. 459 (1926); 7 Charles Allen Wright & Arthur R. Miller, Federal Practice & Procedure § 1606 (3rd ed. 2001).

²Some of the claims the defendant has labeled as "counterclaims" appear to be in fact cross-claims, but in the interest of consistency, the court will utilize the term the debtor has chosen.

1 has been served. F.R.B.P. 7015. *Mayes v. Leipziger*, 729 F.2d 605
2 (9th Cir. 1984).

3 **SUBJECT MATTER JURISDICTION**

4 Although the plaintiff has not argued that the court lacks
5 jurisdiction over the counterclaims, the court makes note that the
6 jurisdictional issues presented by the counterclaims in this
7 adversary are identical to those raised in adversary proceeding
8 A02-011-W11, and the court incorporates by reference the same
9 comments and concerns it made in the prior Memorandum Decision.

10 **RULE 12 MOTION**

11 The plaintiff has argued many bases in support of his motion
12 to strike and dismiss under F.R.B.P. 12, including insufficiency
13 of service, failure to state a claim and res judicata. In light
14 of the court's order dismissing the identical counterclaims in
15 adversary proceeding A02-011-W11, and the court finding no basis
16 on which to rule differently, the court finds the "counter-claims"
17 dismissible for the following reasons:

18 All claims, whether pled sufficiently or not, arising under
19 Title 11 Code sections 502, 523, 542 and 510³ present no
20 justiciable controversy and are moot as the court is unable to
21 fashion any effective remedy outside the context of a pending
22 bankruptcy. See *Spacec v. Thomen (In re Universal Farming)*, 873
23 F.2d 1334 (9th Cir. 1989), *Aheong v. Mellon Mortgage Co. (In re*
24 *Aheong)*, 2002 WL 642711 (B.A.P. 9th Cir. (Haw.) March 29, 2002).

25
26 ³Allowance of claims or interests, Dischargeability of debts
27 (See *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896 (9th Cir. B.A.P.
28 1999), Turnover of property of the estate and Subordination for
purposes of distribution.

1 See also *First State Bank v. Grell (In re Grell)*, 83 B.R. 652 (D.
2 Minn. 1988).

3 All of the counterclaims are based on conclusory allegations
4 insufficient to state a claim. *Nat'l Assn. for Advancement v.*
5 *California Board of Psychology*, 228 F.3d 1043, 1049 (9th Cir.
6 2000); *Assoc. of General Contractors of America v. Metropolitan*
7 *Water District*, 159 F.3d 1178, 1187 (9th Cir. 1998); *Pareto v.*
8 *F.D.I.C.*, 139 F.3d 696 (9th Cir. 1998).

9 The amended answer/counterclaim pleading in no way satisfies
10 the requirement for a short and plain statement of F.R.B.P. 8.
11 *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996).

12 **WITH PREJUDICE**

13 For the same reasons set out in the court's Memorandum
14 Decision in A02-0011-W11 entered on May 8, 2002, the counterclaims
15 are **DISMISSED WITH PREJUDICE**. *Steckman v. Hart Brewing, Inc.*, 143
16 F.3d 1293 (9th Cir. 1998).

17 A separate Order of Dismissal will be entered commensurate
18 herewith. This Memorandum Decision shall constitute the court's
19 findings of fact and conclusions of law.

20 DATED this 17th day of May, 2002.

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23 PATRICIA C. WILLIAMS
24 Chief Bankruptcy Court Judge
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